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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-479.

KATHLENE C. MARENO and ANTONIO MARENO,
Petitioners,

vs.

WESTCHESTER ROCKLAND NEWSPAPERS, INC., and RAYMOND MARGLES,
Respondents.

Brief of Respondent, Raymond Margles, in Opposition to Petition for Certiorari.

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WESTCHESTER ROCKLAND NEWSPAPERS, Inc., and RAYMOND MARGLES,

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Brief of Respondent, Raymond Margles, in Opposition to Petition for Certiorari.

Petitioners pray for certiorari to the Appellate Division of the New York Supreme Court to review its unanimous affirmance of a Special Term summary judgment in favor of respondent Margles who was the defendant in two causes of action in slander brought by petitioners.

POINT I.

Petitioners have no jurisdictional foundation for a writ of certiorari.

Title 28 U. S. C. §1257 gives this court jurisdiction to review by certiorari final judgments and decrees rendered by the highest court of the state in which a decision could be had where any title, right, privilege or

immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under the United States. Petitioners have failed to bring themselves within this jurisdictional statute.

Since here New York's highest court dismissed petitioners' motion for leave to appeal to it from the unanimous affirmance of the Appellate Division as untimely in this case, there is no judgment or decree of the highest court of any state in which a decision could be had, and thus no jurisdiction for issuance of the writ sought.

If petitioners had made a timely motion for leave to appeal, which had been denied, then they would have had a decision of the highest court of the state, but, by their failure to move in time, they did not obtain a judgment reviewable by certiorari under Title 28, §1257 U. S. C.

On this point, this respondent rests on the brief of respondent Westchester Rockland Newspapers, Inc.

POINT II.

Petitioners endeavor to convert questions of state slander law and procedure into federal questions.

The Judge at Special Term wrote:

> "There is absolutely no indication that there was any deliberate malice on the part of defendant Margles, and the statements complained of appear to be merely the spontaneous remark of an irritated public official who felt that the town was being burdened with an unnecessary lawsuit. The plaintiff has not alleged any special damage and this court cannot conceive that the utterances complained of have in any way damaged him in the

practice of his profession (*Gilber v. Gioffi*, 21 A. D. 2d 517, and cases cited therein)."

(Decision of Spec. Term, p. , Petitioners' Brief.)

This holding was unanimously affirmed by the Appellate Division of the Supreme Court.

This presents no federal question but a clear question of state slander law.

"Province of Court and Jury—

"105. Province of Court. Whether words spoken are slanderous per se, provided their meaning is clear, is a question of law for the court.

"*Edwards X-ray Co. v. Ritter Dental Mfg. Co.*, 124 Misc. 898, 210 S. 299; *Woodruff v. Woodruff*, 36 Misc. 15, 72 S. 39; *McKinley v. Rob*, 20 John 351; *Liddle v. Hodges*, 15 N. Y. Super. Ct. 537; *Mishkin v. Roreck*, 202 Misc. 653, 115 S. 269; *Surdi v. Dallman*, 185 S. (2) 988."

(The Law of Libel & Slander in The State of N. Y., Seelman, 2nd Ed., Vol. 2, p. 1058 ¶105.)

The New York Civil Procedure Law and Rules provide for a motion for summary judgment in R. 3212. Subdivision (b) thereof, entitled "Supporting Proof; grounds: relief to either party," provides:

"If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

In this case, respondent Westchester Rockland Newspapers, Inc., charged with libel because it published quotations of statements by respondent Margles, moved for summary judgment against petitioners, plaintiffs below. Special Term granted this motion. After granting summary judgment for respondent publisher on libel

causes (the first and third causes in the complaint), the court wrote:

> "By the same token, the court is of the opinion that the second and fourth causes of action should also fail. There is absolutely no indication that there was any deliberate malice on the part of the defendant Margles, and the statements complained of appear to be merely the spontaneous remarks of an irritated public official who felt that the town was being burdened with an unnecessary lawsuit. The plaintiff has not alleged any special damage and this court cannot conceive that the utterances complained of have in any way damaged him in the practice of his profession (*Gilber v. Gioffi*, 21 A. D. 2d 517, and cases cited therein)."

Mere examination of the claimed slanders discloses that the language pleaded was not slanderous. It charges no crime, it does not hold anyone up to public vilification or disgrace, it causes no public avoidance, it charges no disgraceful disease, and it does not reflect on anyone's occupation or profession. The court found that there was no deliberate malice by respondent Margles, and that "the statements complained of appear to be merely the spontaneous remarks of an irritated public official who felt that the town was being burdened with an unnecessary lawsuit" (Special Term decision).

This is a clear case for application of subdivision (d) of R. 3212 in a case where one defendant had moved for summary judgment and defendant Margles, a party "other than the moving party is entitled to a summary judgment." The statute provides that in such a case the court "may grant such judgment without the necessity of cross-motion" (R. 3212), which is exactly what the court did, and what petitioners complain about.

There is and can be no claim of federal constitutional defect in the statute, lack of due process, or lack of equal protection of the law, or of any other federal question here.

This is a clear case in which petitioners (plaintiffs below) were called upon to resist a motion for summary judgment in libel cases that were founded upon publications of respondent Margles' oral statements upon which petitioners also asserted independent causes of action in slander against respondent Margles.

When the court found the libel actions based on publication of the oral statements insufficient, it almost necessarily proceeded to examine respondent Margles' oral statements which petitioners claimed were slanderous. It found them insufficient on their face to constitute slanders, a finding compelled by mere inspection of the claimed slanders.

Language which is non-libelous is *ipso facto* non-slanderous.

Five justices of the Appellate Division unanimously affirmed, and petitioners moved in the Court of Appeals months after their time expired for permission to appeal. The Court of Appeals dismissed their untimely motion.

Conclusion.

The petitioner should be denied:

(a) because no decision of the highest court of a state in which a decision could be obtained is involved here and thus there is no jurisdiction for certiorari under Title 28, §1257.

(b) because petitioners set up no title, right, privilege or immunity claimed under federal law but mere baseless claims of error under state slander law and state procedure.

Dated: Stony Point, New York,
November , 1971.

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